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No. 03-107

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY JO LARA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
THE CONSTITUTION DOES NOT LIMIT CONGRESS'S POWER TO REMOVE COMMON LAW BARRIERS TO EXERCISES OF TRIBAL SOVEREIGNTY	6
A. The Issue Is The Scope of Congressional Power	6
B. The Constitution Provides Congress With Broad Power To Define The Sovereign Attributes Of Indian Tribes	8
C. The Tribes' Sovereign Power With Respect To Indians And Indian Country Is Governed By Positive Federal Law And Federal Common Law	12
D. The *Duro* Fix Is A Constitutional Exercise Of Congress's Power To Override Federal Common Law Decisions And Reaffirm Tribal Sovereignty	17
E. The Substantial Implications Of A Delegation Of Federal Judicial Power To Tribal Courts Would Be Dramatic, Thereby Demonstrating That *Duro* States A Federal Common Law Rule	24

TABLE OF CONTENTS – continued

Page

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page

Atherton v. *FDIC*, 519 U.S. 213 (1997) 12
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 14
Barnhart v. *Sigmon Coal Co.*, 534 U.S. 438 (2002) 6
Brendale v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) 13
Bryan v. *Itasca County, Minn.*, 426 U.S. 373 (1976) 17
Buckley v. *Valeo*, 424 U.S. 1 (1976) 27
C&L Enters., Inc. v. *Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411 (2001) 21
California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) 14
Cherokee Nation v. *Georgia*, 30 U.S. 1 (1831) 3, 8
City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 4, 14
Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) 26, 27
Cotton Petroleum Corp. v. *New Mexico*, 490 U.S. 163 (1989) 8
Ex parte Crow Dog, 109 U.S. 556 (1883) 9
Delaware Tribal Bus. Comm. v. *Weeks*, 430 U.S. 73 (1977) 4, 11, 20
Duro v. *Reina*, 495 U.S. 676 (1990) ..... *passim*
Freytag v. *Commissioner*, 501 U.S. 868 (1991) 27
Hagen v. *Utah*, 510 U.S. 399 (1994) 10
Heath v. *Alabama*, 474 U.S. 82 (1985) 7
Johnson v. *McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) 8
Kiowa Tribe v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998) 29
Lone Wolf v. *Hitchcock*, 187 U.S. 553 (1903) 11

TABLE OF AUTHORITIES – continued

	Page
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982)	13
Montana v. *Blackfeet Tribe of Indians*, 471 U.S. 759 (1985)	19
Morton v. *Mancari*, 417 U.S. 535 (1974)	11
National Farmers Union Ins. Cos. v. *Crow Tribe of Indians*, 471 U.S. 845 (1985)	13
Negonsott v. *Samuels*, 507 U.S. 99 (1993)	24
Nevada v. *Hicks*, 533 U.S. 353 (2001)	13
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)	15, 16, 29
Oneida Indian Nation v. *County of Oneida, N.Y.*, 414 U.S. 661 (1974)	13
Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946)	19
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978)	3, 8
South Dakota v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998)	10, 11
Stephens v. *Cherokee Nation*, 174 U.S. 445 (1899)	27
Talton v. *Mayes*, 163 U.S. 376 (1896)	3, 5, 9, 17, 21
United States v. *Holliday*, 70 U.S. (3 Wall.) 407 (1865)	8, 11
United States v. *Long*, 324 F.3d 475 (7th Cir.), *cert. denied*, 124 S. Ct. 151 (2003)	22
United States v. *Mazurie*, 419 U.S. 544 (1975)	8, 17
United States v. *McBratney*, 104 U.S. 621 (1881)	25
United States v. *Sandoval*, 231 U.S. 28 (1913)	20
United States v. *Wheeler*, 435 U.S. 313 (1978)	4, 15, 22
Winters v. *United States*, 207 U.S. 564 (1908)	13
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832)	8, 9

TABLE OF AUTHORITIES – continued

CONSTITUTION AND STATUTES	Page
U.S. Const. art. I, § 8, cl. 3	8
art. II, § 2, cl. 2	8, 27
art. III, § 1	26
art. IV, § 3, cl. 2	8
Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830)	9
Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388	9
Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984	9, 10
Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588	18
Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975)	9, 10
Act of Nov. 5, 1990, Pub. L. No. 101-511, 104 Stat. 1856	2
18 U.S.C. § 1152	25
§ 1153	25
25 U.S.C. § 450a(b)	10
§ 450f note	28
§ 903a(b)	22
§ 1301(2)	2, 3, 6
§ 1302	2
§ 1303	2
§§ 2701-2721	14
§ 2702	14
28 U.S.C. § 2675(a)	28

REGULATIONS

41 Fed. Reg. 8516 (1976)	18
46 Fed. Reg. 2195 (1981)	18
51 Fed. Reg. 24,234 (1986)	18
52 Fed. Reg. 8372 (1987)	18

TABLE OF AUTHORITIES – continued

	Page
53 Fed. Reg. 5837 (1988)	18
54 Fed. Reg. 19,959 (1989)	18
LEGISLATIVE HISTORY	
H.R. Rep. No. 101-938 (1991)	23
No. 102-61 (1991)	6
H.R. Conf. Rep. No. 102-261 (1991)	7
S. Rep. No. 102-168 (1991)	6, 26
H.R. Cong. Res. 108, 83rd Cong., 67 Stat. B132 (1953)	9
SCHOLARLY AUTHORITIES	
William C. Canby, Jr., *American Indian Law in a Nutshell* (2d ed. 1988)	9
Robert N. Clinton, *Redressing The Legacy Of Conquest: A Vision Quest For A Decolonized Federal Indian Law*, 46 Ark. L. Rev. 77 (1993)	12
Felix S.Cohen, *Handbook of Federal Indian Law* (1982 ed.)	8, 11, 12, 19, 20
Carole E. Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 U.C.L.A. L. Rev. 1405 (1997)	18
Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L.J. 1 (1999)	9, 10, 20, 22
Charles F. Wilkinson, *American Indians, Time, And The Law* (1987)	12

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages.[1] NCAI is dedicated to protecting the rights and improving the welfare of American Indians.

The Court's decision in this case has critically important implications for both tribal self-government and public safety in Indian country. It will decide whether Tribes may act as sovereigns in administering criminal justice for all Indians or whether, as a practical matter, some Indians will effectively become immune from prosecution for certain crimes on reservations. NCAI Tribes have a strong interest in participating in this case because they are responsible for the administration of justice and public safety in Indian country both as a critical attribute of tribal self-government and as an important duty of Tribes exercising their sovereignty.

INTRODUCTION

In *Duro* v. *Reina*, 495 U.S. 676 (1990), based on its review of relevant precedents, history and policy, this Court held that Tribes lack jurisdiction to prosecute Indians who are not members. This Court acknowledged that its holding might create a significant gap in law enforcement in Indian country because neither the federal, the state, nor the tribal government would have authority to prosecute a non-member Indian for certain crimes committed on a reservation. The Court, however, reasoned that Congress, "which has the

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[1] No one other than the NCAI made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

ultimate authority over Indian affairs," was the appropriate institution to address and resolve this problem. *Id.* at 698. Congress responded immediately by enacting an amendment to the Indian Civil Rights Act ("ICRA"), aptly characterized as the "*Duro* fix." See Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892-93 (codified at 25 U.S.C. § 1301(2) & (4)). In terms that admit of no doubt, Congress "recognized and affirmed" the authority of Tribes to exercise criminal jurisdiction over all Indians as an aspect of their sovereign power. See 25 U.S.C. § 1301(2) (defining tribal "'powers of self-government'" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians"). Significantly, Congress also made it clear that all Indian defendants in tribal courts enjoy the civil rights protections embodied in ICRA, as well as the right to habeas corpus review in federal court.[2]

Respondent Billy Jo Lara, however, asserts that Congress lacks the power to authorize his criminal prosecution by the Spirit Lake Nation as an exercise of the Tribe's sovereign power. Lara, a member of the Turtle Mountain Band of Chippewa Indians, claims that the tribal court of the Spirit Lake Nation was acting not as a sovereign, but as an agency of the United States when it convicted him of assaulting a police officer on the Spirit Lake Reservation. Lara therefore sought dismissal of the United States' subsequent prosecution in federal court based on the same incident, on the ground that he had been "twice put in jeopardy of life or limb" for "the

[2] With the exception of the right to appointed counsel and the right to grand jury indictment for a federal charge, the rights that ICRA guarantees to criminal defendants in tribal court are substantially identical to the constitutional rights of criminal defendants in federal and state courts, including the protections of the Fourth, Fifth, Sixth, and Eighth Amendments. *See* 25 U.S.C. § 1302. And, convicted defendants have access to the writ of habeas corpus. *Id.* § 1303. Tribal courts are also limited to imposing punishments of one year's imprisonment and a $5,000 fine. *Id.* § 1302(7).

same offence" in violation of the Double Jeopardy Clause of the Fifth Amendment. The *en banc* Eighth Circuit held that Lara's prosecution should be barred. Pet. App. 1a-22a.

The court of appeals' decision contravenes fundamental, established precepts of Congressional authority in relations with Tribes and Indians. Where Congress acts in certain realms in which its power is plenary (*e.g.*, Indian law or interstate commerce), Congress may authorize a sovereign entity such as a Tribe or State to exercise governmental authority *qua* sovereign. Congress's recognition of such authority in a Tribe or a State does not convert that sovereign into a federal agency. Nor is Congressional Indian policy confined, as Lara asserts, to the diminution of tribal sovereignty: just as Congress has curtailed tribal sovereignty, Congress may restore and recognize aspects of sovereignty – including tribal criminal jurisdiction over all Indians.

SUMMARY OF ARGUMENT

The Constitution does not limit Congress's power to remove federal common law restrictions on the exercise of tribal sovereignty by "recogniz[ing] and affirm[ing]" "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). To the contrary, Congress may exercise its "plenary" power over Indian affairs to define the bundle of sovereign attributes of the Tribes to include such criminal law jurisdiction. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978).

Although the Tribes' incorporation into the United States limited their ability to conduct foreign relations and to alienate land, they were nonetheless recognized as sovereigns and retained police power within their territory except as limited by Congress. *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 17 (1831); *Talton* v. *Mayes*, 163 U.S. 376 (1896). Throughout our nation's history, Congress has freely exercised its authority to alter tribal sovereignty, generally in

ways that diminished tribal territory and power. This Court has never acted to rein in these congressional abrogations of and amendments to tribal sovereignty, but has permitted federal Indian policy to proceed from isolation, to assimilation, to termination, to self-governance, without a murmur of any constitutional impediment. Indeed, the Court initially treated Indian policy as raising unreviewable political questions, and currently reviews Congress's acts only to determine whether they are "'tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'" *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 85 (1977). And nothing in the Constitution or this Court's precedents suggests that Congress's authority in this area is a one-way ratchet, permitting diminution of tribal sovereignty but never the recognition or affirmation of it.

The Court has uniformly treated the makeup of the bundle of the Tribes' sovereign attributes as a matter for Congress, or absent express Congressional direction, as a matter of federal common law, subject to Congress's authority to propound contrary positive law. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 (1981). Thus, the Court's decisions addressing the scope of tribal courts' criminal jurisdiction establish common law rules subject to Congressional "defeasance." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). The *Duro* fix is a congressional response to this Court's decision holding, as a matter of federal common law, that Tribes lack criminal jurisdiction over non-member Indians. The *Duro* opinion cites no provision of the Constitution compelling its result; to the contrary, the Court suggested that Congress could address any void in criminal jurisdiction in Indian country that might result from its decision. See *Duro*, 495 U.S. at 694.

It is precisely because a Tribe is a sovereign governmental authority that Congress may authorize the Tribe *qua sovereign* to exercise sovereign powers, rather than to act as a federal agency. "[T]he existence of the right in Congress to regulate the manner in which the local powers of the [Tribe]

shall be exercised *does not render such local powers Federal powers*." *Talton*, 163 U.S. at 384. Indeed, in authorizing the Tribes to exercise the sovereign power to prosecute all Indians, Congress acted toward the Tribes as it had acted toward the States when, under Public Law 280, Congress lifted the common law restriction on the States' exercise of criminal and civil jurisdiction in Indian country. Congress's authority vis-à-vis the Tribes in this arena is also analogous to its power to lift the constraints placed on States by the dormant Commerce Clause and to allow States to exercise their sovereign police power. In neither instance are the States somehow transmuted into federal agencies; instead, Congress removes a federal barrier to the exercise of sovereignty – as the *Duro* fix did.

The substantial, damaging implications of holding that tribal sovereignty cannot be authorized – and that Congress must instead delegate judicial power to tribal courts – militate strongly against any such decision. The Court has never addressed whether federal judicial power may be delegated to tribal courts or if so, whether, such courts are Article I courts whose judges are subject to the Appointments Clause of the Constitution – both difficult constitutional questions. If Congress can establish tribal courts as Article I courts, dual prosecutions by such courts and federal courts will place defendants in double jeopardy. If Congress cannot do so, then Congress cannot address criminal law jurisdiction issues by apportioning federal, state and tribal realms, and this Court's entreaties to Congress to enact positive law make little sense. *Duro* does not require Congress to choose between the unpalatable options of delegating judicial power to tribal judges, making tribal courts federal agencies, or allowing non-member Indians to commit certain crimes with impunity in Indian country. Instead, Congress may remove the common law barrier to tribal courts' sovereign power to exercise criminal jurisdiction over all Indians.

ARGUMENT

THE CONSTITUTION DOES NOT LIMIT CONGRESS'S POWER TO REMOVE COMMON LAW BARRIERS TO EXERCISES OF TRIBAL SOVEREIGNTY

A. The Issue Is The Scope of Congressional Power.

There is no question that in enacting the ICRA amendment at issue, Congress intended to affirm the authority of Tribes *qua* sovereigns to exercise criminal jurisdiction over all Indians, both members and nonmembers of the Tribe.

In *Duro* v. *Reina*, 495 U.S. 676 (1990), this Court had held that although Indian Tribes act as sovereigns when they enforce their criminal laws against tribal members, they lack sovereign power to enforce their criminal laws against other Indians. In prompt response to that decision, Congress amended ICRA by clarifying that the Tribes' powers of self-government include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2).

This language makes plain that Indian Tribes are acting as sovereigns when, pursuant to the *Duro* fix, they enforce their criminal laws against any Indian, tribal member or non-member, and is dispositive of the statutory construction issue. See *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The Tribe is deemed to exercise this criminal jurisdiction as a "'power[] of self-government'" – that is, as a sovereign power – and not as a federal agency or instrumentality. 25 U.S.C. § 1301(2). If further assurance were needed, the legislative history provides it. The House Report explicitly states that "this legislation is not a federal delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Rep. No. 102-61, at 7 (1991); see also S. Rep. No. 102-168, at 4 (1991)

("recogniz[ing] and reaffirm[ing] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians"); H.R. Conf. Rep. No. 102-261, at 3 (1991) (similar). By contrast, absolutely nothing in the language and legislative history of the ICRA amendment suggests that Congress sought to delegate federal judicial power to tribal courts or otherwise to convert tribal prosecutors and courts into federal agents and instrumentalities, with the attendant constitutional difficulties that such a delegation would entail. See *infra* at 24-29.

Lara nonetheless argues, and the court of appeals agreed, that the *Duro* fix must have delegated federal judicial power to the Tribes.[3] Specifically, he claims that Congress lacks any authority to alter this Court's common law pronouncements regarding the scope of the Tribes' sovereign power. Instead, the argument runs, because Congress clearly desired to authorize the Tribes to prosecute non-member Indians, the *Duro* fix must be construed as a delegation of federal judicial power to the Tribes. See Pet. App. 10a, 11a (holding "that Congress wished to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians" and therefore that Lara "was necessarily prosecuted pursuant to . . . delegated power"). The premise of this argument runs directly contrary to established principles of Congressional authority with respect to the Tribes.

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[3] The Double Jeopardy Clause prohibits any person "for the same offence to be twice put in jeopardy of life or limb." A person whose action violates the laws of different sovereigns, however, commits an offense against each. Accordingly, a second prosecution by a different sovereign is not for "'the same offence'" and does not run afoul of the Double Jeopardy Clause. *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985). Lara believes that in prosecuting him, the Spirit Lake Nation acted as an agency of the United States, rather than as a separate sovereign, and therefore that the United States' subsequent prosecution violated the Double Jeopardy Clause.

B. The Constitution Provides Congress With Broad Power To Define The Sovereign Attributes Of Indian Tribes.

The Constitution does not define tribal sovereignty as a fixed quantum of power or delineate the attributes of sovereignty that the Tribes possess after their incorporation into the United States. Instead, this Court has long held that Congress, in the exercise of its "plenary" power over Indian affairs, has great latitude to take actions affecting tribal sovereignty. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978).[4]

Tribes were incorporated into the United States as sovereigns or "distinct political communities," albeit subject to the paramount authority of the United States. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 556-57 (1832); Felix S. Cohen, *Handbook of Federal Indian Law* 232 (1982 ed.). Under international law, the Tribes' incorporation was deemed inconsistent with further independent dealings with foreign nations and with external disposition of tribal land, see *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 17 (1831); *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543, 572-88 (1823). But the

[4] The Indian Commerce Clause empowers Congress "to regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. This Clause is the principal constitutional provision conferring federal power over Indians, and this Court has construed it as broadly authorizing Congress to regulate the United States' relationships with Tribes and individual Indians. *See, e.g.*, *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 417-18 (1865); *United States* v. *Mazurie*, 419 U.S. 544, 554-56 (1975); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"). Other constitutional provisions that do not specifically reference Indians, such as the Treaty Clause (U.S. Const. art. II, § 2, cl. 2), and the Property Clause (*id.* art. IV, § 3, cl. 2), are additional sources of federal authority over Indian matters. In conjunction, these constitutional provisions confer upon the federal government a broad power to regulate Indian affairs. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.).

Court otherwise recognized the Tribes' continuing sovereign powers within their territory, subject to the federal government's exclusive power to regulate relations with the Tribes. See *Talton* v. *Mayes* 163 U.S. 376, 384 (1896) (characterizing Cherokee nation's criminal courts as an exercise of "the power[] of local self-government" that "existed prior to the Constitution"); *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883) (recognizing tribal courts' exclusive criminal jurisdiction over tribal members as part of tribal sovereignty unless expressly curtailed or eliminated by the United States); *Worcester*, 31 U.S. at 561.

Through the history of the Republic, Congress has regularly exercised its broad authority over Indian affairs, altering the content of federal Indian policy in a manner that has dramatically affected the scope of tribal sovereignty. See Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L.J. 1, 14-15 (1999).[5] For example, in the late 19th century, Congress "retreated

[5] The initial policy of tribal isolation commenced in 1790 and is symbolized by the Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830). *See also* William C. Canby, Jr., *American Indian Law in a Nutshell* 11 (2d ed. 1988) (citing Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of March 30, 1802, ch. 13, 2 Stat. 139; Act of June 30, 1834, ch. 161, 4 Stat. 729). The policy of assimilation is embodied in the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, which divided and allocated reservation land among individual Indians in a failed attempt to make them farmers. This policy was acknowledged to be a failure, and Congress initially adopted a policy of limited self-determination in the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479). This Act ended allotment, restoring unsold lands to the Tribes, and sought to encourage tribal self-determination. Although the policy of self-determination continues today, *see, e.g.*, Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450-450n, 455-458e), there was a period during the 1950's where a policy of assimilation re-emerged, as the federal government terminated its recognition of approximately 100 Tribes. *See* H.R. Cong. Res. 108, 83rd Cong., 67 Stat. B132 (1953).

from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive homes for Indian tribes." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998). Through the General Allotment Act of 1887 (frequently referred to as the "Dawes Act"), Congress provided for the allotment to individual Indians of treaty-specified reservation land over which Tribes had previously exercised dominion, with "surplus" land opened to non-Indian homesteading. *Id.* at 335-36; *see also* Frickey, *supra*, at 14-15. Implemented on a Tribe-by-Tribe basis, the allotment policy resulted in the diminishment or disestablishment of numerous reservations, with a correspondingly devastating reduction in the ability of the affected Tribes to exercise sovereign authority. See, *e.g.*, *Yankton Sioux*, 522 U.S. at 334 (holding that Congressional legislation enacted pursuant to the Dawes Act had resulted in the diminishment of the Yankton Sioux Reservation, with the result that South Dakota enjoyed primary jurisdiction over land previously held by the Tribe); *Hagen* v. *Utah*, 510 U.S. 399 (1994) (finding the Uintah Valley Reservation in Utah to have been diminished by allotment-era legislation, such that the State could exercise criminal jurisdiction over an Indian who committed an offense on the former reservation land).

In the Indian Reorganization Act of 1934, Congress "formally repudiated" this allotment policy, *Yankton Sioux*, 522 U.S. at 339, and provided that no further divestiture of tribal land take place. Chapter 576, § 4, 48 Stat. 984, 985 (codified at 25 U.S.C. § 464). The Act further set in motion a federal Indian policy of tribal self-governance that continues to this day. See, *e.g.*, Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450-450n, 455-458e); 25 U.S.C. § 450a(b) (declaring Congress's "commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people through the

establishment of a meaningful Indian self-determination policy").

Necessarily, as Congress's federal Indian policy has changed, so, too, has Congress's conception of the appropriate scope of tribal sovereignty. See, *e.g.*, Cohen, *supra*, at 239-40. Yet, this Court has never gainsaid either Congress's plenary authority to make and change Indian policy or Congress's related plenary authority to diminish or expand tribal sovereignty. To the contrary, the Court has frequently reiterated that "Congress possesses plenary power over Indian affairs, *including the power to modify or eliminate tribal rights*." *Yankton Sioux*, 522 U.S. at 343 (emphasis supplied).

This Court initially treated the federal government's relationship with Indians as if it were analogous to the federal government's relationship with foreign states – *viz.*, as if the relationship involved political questions, not subject to judicial review. See, *e.g.*, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903) (characterizing Congress's authority over the Indians as "a political one, not subject to be controlled by the judicial department of the government"); *Holliday*, 70 U.S. at 419 ("[i]n reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs"). As the 20th century progressed, the Court ceased to treat tribal relations as presenting unreviewable "political" questions, but nonetheless placed no substantial constraints on congressional power. Today, this Court characterizes Congress's power in this arena as "plenary," reviewable only to determine whether the legislative act is "'tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'" *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 83-85 (1977); *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974).

Congress's exercises of its "plenary power" have most frequently diminished tribal sovereignty, often with serious

consequences for the Tribes. For example, in *Lone Wolf*, the Court upheld Congress's power to abrogate Indian treaties, and the assertion of that power in the allotment era resulted in the loss of 90 million acres of tribal land and corresponding diminutions in sovereign power. See generally Cohen, *supra*, at 129-38; Charles F. Wilkinson, *American Indians, Time, And The Law* (1987); Robert N. Clinton, *Redressing The Legacy Of Conquest: A Vision Quest For A Decolonized Federal Indian Law*, 46 Ark. L. Rev. 77 (1993). Although the Tribes have often vigorously resisted Congressional Indian policies, the Court has consistently treated the makeup of the bundle of sovereign attributes as a matter for Congress or, if Congress has not spoken, as a matter of federal common law. Here, however, without textual support in the Constitution, the Eighth Circuit held that Congress's authority in this area is a one-way ratchet – *viz.*, Congress may strip the Tribes of their sovereign attributes but may not authorize or restore tribal sovereignty. Nothing in either the Constitution or this Court's precedents supports this internally inconsistent view of Congressional authority, and it should be rejected.

C. The Tribes' Sovereign Power With Respect To Indians And Indian Country Is Governed By Positive Federal Law And Federal Common Law.

1. In light of the constitutional context described above, this Court has assessed the sovereign authority of the Tribes by examining positive federal law (treaties, statutes, executive orders, and federal regulations) and by filling the gaps in positive law with federal common law.[6] The Tribes' authority to regulate the people and activities within their

[6] A federal common law rule is "a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision" in an area where uniform federal law is necessary to further "'some federal policy or interest.'" *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997).

reservations is uniformly analyzed within this framework, and is often governed by federal common law rules.

Thus, for example, in *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), this Court held that a federal district court had federal question jurisdiction to decide the lawful limits of tribal court jurisdiction, because the scope of the tribal court's power was a question of federal common law rules "fashioned by court decisions." *Id.* at 850. In elaborating, the Court observed generally that federal common law "provides significant protection for the individual, territorial, and political rights of the Indian tribes." *Id.* at 851.

In assessing the scope of tribal sovereignty, this Court has routinely sought to discover Congress's will and, where it failed to unearth an express or clear manifestation of that will, has developed federal common law rules. Most recently, in *Nevada* v. *Hicks*, 533 U.S. 353 (2001), the Court explained that Tribes have sovereign powers where necessary "'to protect tribal self-government or to control internal relations,'" and, indeed, may possess even broader sovereignty with express congressional authorization. *Id.* at 359. See also *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (plurality opinion) (authorizing Tribes to zone "closed" reservation lands and to zone open lands to prevent uses that threaten important tribal interests); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137, 142 (1982) (upholding tribal power to tax non-members leasing mineral rights in reservations because "there is a significant territorial component to tribal power" and "[t]he power to tax is an essential attribute of Indian sovereignty"); *Oneida Indian Nation* v. *County of Oneida, N.Y.*, 414 U.S. 661 (1974) (possessory land claims that implicate Indian lands are the exclusive province of federal law); *Winters* v. *United States*, 207 U.S. 564 (1908) (reserved water rights of Tribes are governed by federal common law).

The clear implication of these decisions is that absent positive law, the scope of tribal sovereignty, like federal Indian law generally, is a matter of federal common law. It is equally clear, however, that these decisions, like all common law decisions of the federal courts, are subject to the ultimate authority of Congress to propound positive law. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 (1981).[7] Thus, where "Congress addresses a question previously governed by a decision rest[ing] on federal common law the need for [federal common] lawmaking by federal courts disappears." *Id.* at 314.[8]

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[7] Thus, the law governing Congress's power to regulate relations with Indian tribes is analogous to the political branch's power to regulate foreign affairs. Federal common law governs, subject to defeasement by a political branch. This Court made that point clearly in describing the nature of the act of state doctrine. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427-28 (1964) ("[i]f the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and the political branches of the Government on matters bearing upon foreign affairs").

[8] Congress frequently acts in response to the common law decisions of this Court regarding tribal sovereignty. A well-known example is the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court held that State regulation of tribal gaming enterprises would impermissibly infringe on tribal governmental authority in light of the compelling federal and tribal interests in promoting tribal self-sufficiency and economic development. *Id.* at 221-22. A year later, Congress enacted IGRA to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences." 25 U.S.C. § 2702. With far greater detail than common law decision-making allows, Congress established an intricate structure that distinguishes among types of gaming, provides federal regulatory oversight, and subjects certain

2. The foregoing analysis is fully applicable to this Court's decisions addressing the scope of tribal courts' criminal jurisdiction. This Court's criminal cases established common law rules subject to Congressional "defeasance." *Wheeler*, 435 U.S. at 323. Congress subsequently acted, displacing the common law rule and expressing its will statutorily with respect to tribal criminal law jurisdiction.

Wheeler, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *Duro* – the principal decisions of the modern era regarding tribal criminal jurisdiction – are not constitutionally based. They are instead federal common law decisions subject to Congressional override or amplification. Indeed, in recognition of this fact, the Court implicitly invited Congress to revise its decisions in *Oliphant*, 435 U.S. at 211, and *Duro*, 495 U.S. at 694.

In *Wheeler*, this Court recognized that both the Navajo tribal court and a federal court could prosecute a Navajo tribal member for crimes arising out of a statutory rape without violating the Double Jeopardy Clause, because the Navajo prosecution was "part of its retained sovereignty." 435 U.S. at 328. The critical issue was whether the Tribes' sovereign power had been "explicitly or implicitly" taken away by Congress, and the Court concluded that it had not.

In *Oliphant*, this Court held, as a matter of federal common law, that the Tribe's jurisdiction to try non-Indian criminal defendants had been terminated when the Tribe was incorporated into the United States. The Court analyzed the history of legislation and treaties that demonstrated *Congress's* apparent assumption that the Tribes lack criminal jurisdiction over non-Indians except as provided by treaty, 435 U.S. at 196-206, and made clear that Congress could recognize such jurisdiction if it chose to do so: "By submitting to the overriding sovereignty of the United States,

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gaming to the requirements of a State compacting process to address off-reservation effects of gaming.

Indian tribes therefore necessarily give up their power to [criminally] try non-Indian citizens of the United States *except in a manner acceptable to Congress*." *Id.* at 210 (emphasis supplied). See *id.* at 212 (identifying "considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians").

Duro is to the same effect. In holding that Tribes cannot prosecute a non-member Indian, the Court again found support in its belief that the political branches of the federal government assumed that tribal courts lacked such jurisdiction. 495 U.S. at 688-89. In addition, the Court expressed a policy concern that the exercise of criminal jurisdiction might not adequately protect the non-member Indian's "personal liberties." *Id.* at 688. The Court acknowledged that all Indians are United States citizens, tribal members and non-members alike. It nonetheless relied on "the voluntary character of tribal membership and the concomitant right of participation in a tribal government" to reaffirm the Tribe's sovereign power to prosecute tribal members criminally. *Id.* at 677-78. But, in light of its solicitude for citizens' civil liberties, the Court was unwilling to assume that tribal courts enjoyed criminal jurisdiction over non-member Indians, despite their voluntary presence on and activities affecting public safety on tribal lands: "We hesitate to adopt a view of tribal sovereignty that would single out . . . nonmember Indians . . . for trial by political bodies that do not include them." *Id.* at 693. In declaring federal common law, the Court accordingly "declined to produce such a result through recognition of inherent tribal authority." *Id.* at 694.

Nothing in *Duro* limits Congress's authority to decide, as it has done, that the attributes of sovereignty of a Tribe include the sovereign power criminally to prosecute all Indians for crimes committed in Indian country. The Court did not cite any provision of the Constitution or refer to any penumbral emanation from the Constitution that would preclude Congress from affirming such sovereign powers. Nor did the

Court suggest any limitation on Congress's ability to decide that a person's voluntary presence on or activities affecting public safety on tribal lands may subject that person to tribal court jurisdiction. Indeed, the Court invited Congress to exercise its "ultimate authority" and lift the constraint its decision imposed on the exercise of such authority by the Tribes, *id.* at 698; Congress promptly did just that.

D. The *Duro* Fix Is A Constitutional Exercise Of Congress's Power To Override Federal Common Law Decisions And Reaffirm Tribal Sovereignty.

1. It was in response to the *Duro* Court's invitation that Congress enacted the ICRA amendment at issue, authorizing the Tribes as sovereigns to prosecute all Indians in Indian country. The statute overrode the contrary federal common law decision of the Court. Because a Tribe is a sovereign governmental entity, see *Mazurie*, 419 U.S. at 557 (Indian Tribes are not "'private, voluntary organizations,'" but are instead "unique aggregations possessing attributes of sovereignty over both their members and their territory"), Congress may recognize or restore sovereign tribal powers, *i.e.*, Congress may authorize the Tribe to exercise power *qua* sovereign, and not as a federal agency. As this Court has explained, "the existence of the right in Congress to regulate the manner in which the local powers of the [Tribe] shall be exercised *does not render such local powers Federal powers*." *Talton*, 163 U.S. at 384 (emphasis supplied).

In restoring the Tribes' sovereign power to prosecute all Indians, Congress simply did for Tribes what it had done for States in Public Law 280. Federal common law preempts state criminal jurisdiction over crimes committed by or against Indians in Indian country. See *Bryan* v. *Itasca County, Minn.*, 426 U.S. 373 (1976). In 1953, however, Congress enacted Public Law 280, making mandatory the extension of the criminal jurisdiction of five (later six) States into Indian country. Other States are authorized to exercise such jurisdiction at their option. See Act of Aug. 15, 1953,

Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 1360 (1994)). The law was later amended to require tribal consent to state jurisdiction.[9]

When Congress authorized States to exercise criminal jurisdiction over Indian country, that act did not convert the sovereign States to federal instrumentalities for this purpose. Instead, Congress freed the States of a pre-existing federal common law limitation on their ability to exercise a sovereign power – the States' police power with respect to public safety. Similarly, Congress's amendment of ICRA to restore the Tribes' inherent sovereign power to prosecute non-member Indians for crimes on reservations simply freed the Tribes of a federal common law constraint on their sovereignty.

Another example of the same phenomenon lies in the realm of state taxation of Indian lands. "[I]n recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are

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[9] This is not to suggest tribal jurisdiction over non-member Indians crimes can or will be taken care of by the States. Leaving aside the States whose Indian country jurisdiction Congress made mandatory, the States have been reluctant to take up such jurisdiction; they regard criminal law enforcement on Indian reservations as a kind of unfunded federal mandate, *see* Carole E. Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 U.C.L.A. L. Rev. 1405, 1427 (1997), and Indian Tribes in non-mandatory States have been equally reluctant to invite state law enforcement onto reservations. Indeed, even in mandatory States, there have been significant retrocessions of state jurisdiction to Tribes, *see*, *e.g.*, 51 Fed. Reg. 24,234 (1986) (Winnebago); 46 Fed. Reg. 2195 (1981) (Umatilla); 41 Fed. Reg. 8516 (1976) (Menominee). A similar phenomenon has occurred in States where Public Law 280 jurisdiction was optional, *see*, *e.g.*, 52 Fed. Reg. 8372 (1987) (Colville); 54 Fed. Reg. 19,959 (1989) (Chehalis, Quileute, and Swinomish); 53 Fed. Reg. 5837 (1988) (Ely Indian Colony). In States like North Dakota that have not taken jurisdiction under Public Law 280, only the Tribes enforce reservation Indians' compliance with criminal laws related to non-"major" crimes, such as spousal abuse.

exempt from state taxation within their own territory." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) (citing cases). However, Congress may lift the Tribes' exemption from state taxes when it "has made its intention to do so unmistakably clear." *Id.* at 765. When Congress does so, the State is not exercising power as a federal agent; it is instead exercising its sovereign taxing authority because the federal common law restriction on that authority has been lifted by Congress.[10]

Congress's authorization of the Tribes' sovereign power thus may also be analogized to Congress's power vis-a-vis the States under the dormant Commerce Clause. That Clause implicitly limits the States' sovereign power to regulate all commerce within their boundaries. Congress, however, may release the States from the limitation and allow the States to regulate commerce in ways that the Constitution otherwise would forbid. *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 421 (1946). In that circumstance, the State exercises its power not as an agency of the United States, but as a separate sovereign.

Likewise here, in the absence of Congressional action, the Tribes' sovereign powers with respect to criminal jurisdiction were viewed as constrained. But, under the Indian Commerce Clause, Congress, in the exercise of its plenary authority over relations with Indian Tribes, determined that a particular exercise of sovereignty – here, the prosecution of a non-member Indian for a crime committed on a reservation – best serves federal Indian policy, including tribal self-governance and criminal law enforcement on Indian reservations. Just as a State regulating commerce after Congress lifts the constraint

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[10] Indeed, it is precisely because Indian Tribes are sovereigns (not federal instrumentalities) that this Court analyzes the validity of a state tax on tribal land by determining whether it is expressly authorized by Congress or preempted, rather than by determining whether the land is a federal instrumentality. *See* Cohen, *supra*, at 421-23.

of the dormant Commerce Clause is exercising sovereign legislative or regulatory authority, a Tribe exercising prosecutorial power after Congress lifts a common law constraint exercises its sovereign power.[11]

The *Duro* fix simply overturned a federal common law rule restraining an entity already acknowledged to be a sovereign, the Tribes, and thus released the Tribes to act as sovereigns with respect to their exercise of criminal law jurisdiction.[12]

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[11] One scholar has illustrated this point effectively:

> Suppose that the federal courts conclude that a state regulation of semitrailer truck length unduly burdens interstate commerce and declare the state law invalid under the dormant Commerce Clause doctrine – which, although a constitutionally rooted rule, is actually best understood as an aspect of federal common law. Then suppose that Congress enacts legislation authorizing states to regulate the length of such trucks. Surely when the state resumes truck-length regulation, it is exercising its inherent police power – which always existed, even though for a time it was preempted by federal common law – rather than some peculiar delegated federal authority. The effect of the congressional authorizing legislation was to destroy the preemptive barrier of federal common law – thereby allowing the always-existing-but-once-preempted local police power to spring back free from judicial interference – not to delegate special federal power to the state. [Frickey, *supra*, at 68 n.322 (citation omitted).]

[12] This Court's recognition of Congress's power to affect tribal sovereignty in other respects strongly supports the conclusion that Congress has that authority in this case. While Congress has often chosen to defer to tribal membership determinations, *see* Cohen, *supra*, at 20-23, this Court has held that Congress has virtually unlimited authority to define tribe and tribal membership differently as a matter of federal law, *United States* v. *Sandoval*, 231 U.S. 28, 37 (1913); *Delaware Tribal Bus. Comm.*, 430 U.S. at 83-85 (the legislative judgment concerning a tribe is not disturbed so long as special treatment is rationally connected to fulfillment of Congress' obligation to Indians). Congress's broad discretion to determine tribal membership – *viz.*, to expand or contract it and thus to alter the scope of tribal sovereignty – is significant evidence that it is federal positive and common law, rather than the Constitution, that governs the Tribes' attributes of sovereignty.

As such, the statute fits comfortably within Congress's plenary authority with respect to federal Indian policy.

2. Those arguing that *Duro*'s holding is mandated by the Constitution pluck discrete words and phrases out of the context of the opinion (and, indeed, from the context of federal Indian law), and then imbue these words and phrases with layered meaning. But, a constitutional structure – *viz.*, a rigid federal Indian law policy – cannot be built upon so limited a foundation.

First, respondent and the lower court suggest that the *Duro* Court's reference to the absence of a congressional "delegation" of prosecutorial authority over non-member Indians implies that Tribes can exercise this authority only as agencies of the federal government, and not as sovereigns. However, the Court's use of the word "delegation" in recognizing that Congress could correct any gaps in law enforcement resulting from its decision cannot be tortured into a judicial pronouncement that Congress can fill the gap *only* by turning tribal courts into federal agencies. In context, the word "delegation" refers to Congress's power to authorize exercises of tribal sovereignty. In fact, as explained *supra* at 17-20, when governmental power is "delegated" to a sovereign, that entity may exercise it as a sovereign if Congress so provides. Cf. *Talton*, 163 U.S. at 384 ("the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers"). Finally, as it set forth in detail in Part E., *infra*, the

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A similar point can be made with respect to Congressional control over tribal sovereign immunity. This Court has held that a Tribe is entitled to sovereign immunity and thus is not subject to suit "unless 'Congress has authorized the suit or the tribe has waived its immunity.'" *C&L Enters., Inc.* v. *Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411, 414 (2001) (quoting *Kiowa Tribe* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998)). This attribute of sovereignty, too, is therefore a matter of federal positive and common law.

serious constitutional questions raised by a delegation of federal judicial power to tribal courts strongly suggests that this Court's use of the word was not intended to limit Congressional authority.

In a related point, the court below appears to have believed that "[o]nce the federal sovereign divests a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress's power." Pet. App. 8a. This Court has never so held. To the contrary, the Court reserved this question in *Wheeler*, 435 U.S. at 328 n.28 ("[b]y emphasizing that the Navajo Tribe never lost its sovereign power to try tribal criminals, we do not mean to imply that a tribe which was deprived of that right by statute or treaty and then regained it by Act of Congress would necessarily be an arm of the Federal Government"). Moreover, this Court's deferential treatment of Congress's frequent changes of policy concerning tribal sovereignty belie this claim. See *supra* at 9-11. The *Duro* fix "did not create a new tribal power out of whole cloth, it merely relaxed a common-law restriction on a power previously possessed" by a sovereign, as Congress, with its plenary authority in this area, is fully empowered to do. Pet. App. 12a-13a (Arnold, J., dissenting). See Frickey, *supra*, at 8. Indeed, if a sovereign power once lost is lost forever, then the scores of Tribes with respect to which federal recognition has been withdrawn and restored would exercise *no* sovereign powers – contrary to Congress's clear intent and the decades-long practice since restoration. See, *e.g.*, 25 U.S.C. § 903a(b) ("there are hereby reinstated all rights and privileges of the [Menominee] tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to" termination); cf. *United States* v. *Long*, 324 F.3d 475 (7th Cir.) (Menominee Tribe exercises sovereign authority, not delegated United States' authority, in criminal prosecutions), *cert. denied*, 124 S. Ct. 151 (2003).

The lower court also erroneously believed that the ICRA amendment violates separation of powers by reversing this Court's factual finding concerning tribal court jurisdiction over non-member Indians. It is because *Duro* is not a constitutionally-based holding that *Duro*'s conclusion – that a Tribe lacks the sovereign attribute of criminal jurisdiction over Indians who are not tribal members – is not a constitutional fact estopping Congress from rendering a contrary judgment. Indeed, the *Duro* Court's assessment of the historical record was hardly categorical. The Court concluded that "[e]vidence on criminal jurisdiction over nonmembers is less clear [than with respect to non-Indians]" and merely "on balance supports the view that inherent tribal jurisdiction extends to tribe members only." 495 U.S. at 691. Accordingly, whatever the limitations on Congress's ability retroactively to disagree with the Court's factual determinations, this simply is not a case where congressional disagreement can be viewed as unreasonable, arbitrary, or counterfactual, let alone a violation of separation of powers. Indeed, in light of Congress's virtually plenary authority to determine the sovereign powers of Tribes, an ambiguous historical record does not limit Congress's power to recognize Tribal authority to prosecute non-member Indians.[13]

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[13] As Congress explained in enacting the ICRA amendment at issue,

> [t]hroughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over non-tribal member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members. Instead the Congress has recognized that tribal governments afford a broad array of rights and privileges to non-tribal members. Non-tribal member Indians own property on Indian reservations, their children attend tribal schools, their families receive health care from tribal hospitals and clinics. Federally administered programs and services are provided to Indian people because of their status as Indians, without regard to whether their tribal membership is the same as their reservation residence. [H.R. Rep. No. 101-938, at 133 (1991).]

Finally, this case does not raise the question whether the ICRA amendment violates the Equal Protection Clause by authorizing *tribal prosecution* of non-member Indians, because only the *federal prosecution* is at issue here. Such a challenge could appropriately be raised only in the context of a tribal prosecution or a habeas petition challenging such a prosecution. And, when raised in that context, the claim will have to contend with the *Duro* Court's reaffirmation that Indians' status as citizens "does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits." *Id.* at 692 (citing *United States* v. *Antelope*, 430 U.S. 641 (1977)). In addition, the court would have to consider that under ICRA, tribal courts provide almost all constitutional protections provided in federal court, as well as access to the Great Writ, and are severely constrained in their authority to imprison or fine. See note 2 *supra*.

In sum, under this Court's established jurisprudence, Congress has "plenary authority to alter" and define the allocation of criminal jurisdiction in Indian country, see *Negonsott* v. *Samuels*, 507 U.S. 99, 103 (1993). This Court has sanctioned Congress's abrogation of tribal powers on the grounds that such powers are not dictated by the Constitution. The same principle surely operates to protect Congressional action against attack where Congress has sought to vindicate tribal powers. Congress's clearly manifested intent governs: The Tribes act as sovereigns in criminally prosecuting Indians for non-"major" crimes in Indian country.

E. The Substantial Implications Of A Delegation Of Federal Judicial Power To Tribal Courts Would Be Dramatic, Thereby Demonstrating That *Duro* States A Federal Common Law Rule.

In *Duro*, this Court acknowledged that its holding could result in a jurisdictional void in criminal law enforcement in Indian country, but declared that Congress had ultimate authority to fill any such void. When the substantial

constitutional questions raised by the delegation of federal judicial power to the tribal courts are considered, this Court's matter-of-fact statement that Congress could cure any ill effects of its decision is another indication that the holding rested on federal common law and that Congress may constitutionally define the Tribes' sovereignty to include criminal jurisdiction over all Indians. Indeed, the implications of a holding that Congress cannot recognize or restore the scope of tribal sovereignty and can fill the jurisdictional void left by *Duro* only through delegating federal judicial power are dramatic – potentially making it impossible for Congress to bring cohesion and rationality to criminal law enforcement (and other issues) in Indian country and rendering this Court's requests for Congressional action incoherent.

Federal criminal statutes establish the basic law enforcement framework for Indian country. The Indian Country Crimes Act provides that the criminal law of the United States applies in Indian country with the important exception that it does "not extend to offenses committed by one Indian against the person or property of another Indian." 18 U.S.C. § 1152. Under the Major Crimes Act, however, the federal government has jurisdiction to prosecute Indians for named "major" crimes in Indian country whether the victim is "another Indian or other person." *Id.* § 1153.[14] There remains the question of prosecution of non-"major" crimes committed by Indians in Indian country.

Under *Wheeler*, tribal courts may prosecute members for such crimes. And, under Public Law 280, a State may have jurisdiction to enforce its criminal laws against Indians in

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[14] Only States covered by Public Law 280 have criminal jurisdiction over Indian country within their borders. Absent this or some analogous federal authorization, state courts have criminal jurisdiction in Indian country only when both the accused and the victim are non-Indian. *See United States* v. *McBratney*, 104 U.S. 621, 624 (1881).

Indian country if the State agrees to assume such jurisdiction and if the Tribe consents to it. These stars have not often aligned, however; and, as was true here, State jurisdiction is usually lacking. Accordingly, as this Court acknowledged, *Duro* left a "jurisdictional void" – non-"major" crimes committed by an Indian who was not a member of the Tribe with sovereignty in the relevant reservation could not be prosecuted by any government. See also S. Rep. No. 102-168, at 4. But, the Court did not consider this a serious impediment to its holding, because it also recognized that Congress, with its "ultimate authority over Indian affairs," had the power to eliminate the jurisdictional gap. *Duro*, 495 U.S. at 698.

The Court's seemingly simple proposal only works if the Court assumed that Congress would be able to restore the Tribe's sovereign powers. If the fix depends upon purely delegated authority, the issue is at the very least complicated, given the limits on Congress's ability to delegate federal judicial power.

First, Article III, Section 1 provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and further mandates that the judges of those courts shall hold office during good behavior and receive compensation that is not diminished during their tenure. The constitutionality of a delegation of federal judicial power to a non-Article III body such as a tribal court "must be assessed by reference to the purposes underlying the requirements of Article III" – the preservation of an impartial and independent federal adjudication of claims and the safeguarding of the judicial role within the federal system. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 849-50 (1986). In determining whether a criminal-jurisdiction delegation undermines the purposes of Article III, the Court considers, *inter alia*, "the extent to which the non-Article III forum exercises the range of jurisdiction and

powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." *Id.* at 851 (citing cases).

The Court has never addressed whether a delegation of federal judicial power to tribal courts, let alone a delegation of criminal jurisdiction to tribal courts, passes muster under Article III. Cf. *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899) (special temporary court established solely to address rights of individuals to citizenship in named tribes). Plainly, the question would require a complex balancing of the purposes of Article III and the historic role of tribal governments and courts. It therefore seems highly unlikely that the Court had a delegation of Article III power in mind when it stated without elaboration in *Duro* that Congress had "ultimate authority" over Indian affairs to fill any jurisdictional void in criminal law enforcement in Indian country.

Second, if Congress were to delegate federal judicial power to tribal courts, then tribal courts arguably would be Article I or legislative courts, making the judges of such courts "inferior Officers" whose appointments must conform to the Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 2. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam) ("any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]"); *Freytag* v. *Commissioner*, 501 U.S. 868, 881 (1991) (holding that special trial judges in the tax court are "'inferior Officers'" under the Appointments Clause). Under the Appointments Clause, "the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Again, it seems improbable that the Court in *Duro* intended to require the appointment of tribal judges

pursuant to the Appointments Clause when it opined that Congress had ultimate authority to restore the criminal jurisdiction of tribal courts.[15]

As this discussion shows, the implication of holding that Congress cannot amend the scope of tribal sovereign powers would be substantial and dramatic. Assuming that it could do so, Congress would be required to create Article I courts (or deem tribal courts Article I courts) for certain defendants (nonmember Indians), but not for others, to preserve insofar as possible tribal self-governance. Tribal judges would have to be appointed pursuant to the Appointments Clause to the extent they were adjudicating cases against nonmember defendants. It would be extremely difficult, if not impossible, to establish a coherent, rational structure of tribal courts in this setting. Moreover, any trial by a tribal court would preclude subsequent federal prosecution under the Double Jeopardy Clause, despite the Tribes' extremely limited authority to imprison or fine. Tribes would be put to the choice of prosecuting non-member Indians, thereby eliminating the possibility of more substantial federal prosecutions, or of abstaining from such prosecutions in the hope that the federal government, whose resources and inclination to address such matters are limited, will assume the responsibility. In either event, many defendants facing

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[15] It is also noteworthy that if Congress converted tribal courts to federal agencies or instrumentalities, the United States would face expanded liability for the torts of tribal courts and prosecutors pursuant to, *e.g.*, the Federal Tort Claims Act, 28 U.S.C. § 2675(a). The expansion of Congress's waiver of federal sovereign immunity is a serious consequence of treating tribes and tribal officers as federal agents or instrumentalities in exercising criminal law jurisdiction. Again, the Court's easy assumption of Congress's power to fill *Duro*'s jurisdictional void seems inconsistent with the gravity of the consequences that an exercise of such power would entail. (There are instances in which the United States has expressly taken on tort liability for tribal actions, *see* Claims Resulting from Performance of Contract; Civil Action Against Tribe, 25 U.S.C. § 450f note, but the ICRA amendment at issue contains no indication of any such intent.)

serious criminal charges (such as Lara) would ultimately either avoid prosecution or receive a less serious punishment than their crimes warrant.

Equally to the point, if Congress cannot authorize the Tribes to act *qua* Tribes, and if delegation is constitutionally problematic, then Congress will be severely constrained in bringing a greater uniformity and precision to bear on the allocation of jurisdiction in Indian country than common law decision making allows. Correspondingly, the Court's invitations to Congress to address the complicated jurisdictional issues that arise in Indian country will make little sense. See *Oliphant*, 435 U.S. at 212 ("these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians"); *Kiowa Tribe* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 760 (1998) (choosing "to defer to Congress" on the question whether the federal common law of tribal sovereign immunity be changed).

In sum, nothing in *Duro* even hints that this Court believed that the federal government would face the Hobson's Choice of either (a) delegating Article III judicial power to tribal judges appointed pursuant to the Appointments Clause (if such a delegation is constitutional) and converting tribal prosecutors and courts into federal agents or (b) living with a jurisdictional void and giving non-member Indians a free pass to commit non-"major" crimes in Indian country. *Duro* instead allows Congress to address the jurisdictional void resulting from the decision by removing the barrier posed by the Court's federal common law rule to tribal criminal prosecution of all Indians.

CONCLUSION

The judgment of the court of appeals should be reversed.

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